

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-O-15104-DFM
DEBRA LOUISE KASTELIC,)	DECISION
Member No. 144682,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Gordon L. Grenier appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar).¹ Respondent Debra Louise Kastelic did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for one year; that execution of the suspension be stayed; and that she be actually suspended for 75 days and until she makes restitution as specified below, among other things.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on May 17, 2007, and was properly served on respondent on that same date at her official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section² 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt card bearing what

¹After this matter was submitted for decision, Supervising Trial Counsel Janet S. Hunt substituted in place of Mr. Grenier as counsel on behalf of the State Bar of California.

²Future references to section are to the Business and Professions Code.

appeared to be respondent's signature was returned to the State Bar.

On May 25, 2007, respondent was properly served by first-class mail, postage prepaid, at her official address with a notice advising her, among other things, that a status conference would be held on July 3, 2007.

Respondent did not appear at the July 3 status conference. On July 10, 2007, she was properly served with an order memorializing the status conference at her official address by first-class mail, postage prepaid. Among other things, the order noted that a status conference was scheduled on August 15, 2007.

Respondent did not appear at the August 15 status conference. On August 21, 2007, she was properly served with a status conference order at her official address by first-class mail, postage prepaid.³

Respondent did not file a responsive pleading to the NDC. On August 15, 2007, a motion for entry of default was filed and properly served on respondent at her official address by certified mail, return receipt requested. The motion advised her that discipline of at least 90 days actual suspension would be sought if she was found culpable. Respondent did not file a response to the motion.⁴

On September 11, 2007, the court issued an order entering respondent's default and enrolling her inactive effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested. The return receipt was returned to the State Bar Court bearing an illegible signature.

³Respondent did not appear at the status conferences despite telephone conversations with the deputy trial counsel (DTC) then-assigned to the case on July 3 and 12 and August 15, 2007, and despite correspondence from the DTC. Respondent indicated on July 3 that she had been ill and that her mother had recently passed away. On July 12, she indicated that she was considering hiring counsel to represent her. On July 16, 2007, during a telephone conversation made on respondent's behalf by a friend, Ed Antuna, Mr. Antuna told the DTC that respondent was considering hiring counsel. On August 15, when the DTC called respondent after the status conference, she indicated that she was not aware of the status conference. Nevertheless, it is clear that respondent was aware of this pending proceeding.

⁴Pursuant to Evidence Code section 452, subdivision (h), the court grants the State Bar's request and takes judicial notice of all of respondent's official membership records addresses.

The matter was submitted for decision without hearing after the State Bar filed a brief on September 20, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted, and no further proof is required to establish the truth of those allegations. (Section 6088; Rules Proc. of State Bar⁵, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 18, 1989, and has been a member of the State Bar at all times since.

B. The DeFazio Matter

1. Facts

In 2001, respondent prepared certain estate planning documents for Anthony Jerry DeFazio (DeFazio) and Helen DeFazio, husband and wife, including a living trust and powers of attorney.

Helen died in 2005.

At all relevant times, DeFazio's adult son, Anthony Joseph DeFazio (Tony) held power of attorney over all of DeFazio's legal and business affairs and DeFazio knew it.

In May 2006, DeFazio asked respondent to come to his home to discuss plans to modify his estate plan due to changed circumstances after Helen's death. DeFazio was 86 years old at the time and was unable to drive.

On May 2, 2006, at DeFazio's home, respondent, DeFazio and Tony discussed the desired changes to the estate plan. Respondent was specifically told that the modifications were

⁵Future references to the Rules of Procedure are to this source.

urgent because DeFazio was not in good health and that time was of the essence. Respondent assured DeFazio that the modifications would be complete within two weeks because she already had the original estate planning documents. Because of these assurances, DeFazio hired respondent to modify his estate plan. On that date, he paid respondent approximately \$695.00 as advanced attorney's fees expressly intended to pay for "Preparation of Revocable Living Trust and Durable Power of Attorney for Health Care, General Power of Attorney and Pour-Over-Will."

Between approximately May 2, 2006, and October 11, 2006, Tony telephoned respondent on at least 15 occasions, including but not limited to the following:

- (1) In June 2006, Tony called respondent at least twice. The telephone just rang unanswered, not even by an answering service or answering machine.
- (2) In July 2006, Tony called respondent at least twice, each time leaving a message asking respondent about the status of the modifications to DeFazio's estate plan and asking her to call him back. She did not return any of the calls nor did she otherwise provide Tony or DeFazio with any information about the status of DeFazio's legal matter.
- (3) In August 2006, respondent returned one of Tony's phone calls. She told Tony that she had mailed the modified estate planning documents to DeFazio, but that they had been returned to her as undeliverable.

Between the time that respondent was hired in May 2006 through at least March 2007, DeFazio resided at the same address, which he also used as his mailing address. At all relevant times, respondent knew DeFazio's correct residence and mailing address.

Neither DeFazio nor Tony received from respondent any modifications to DeFazio's estate planning documents.

Between approximately May and October 2006, DeFazio required emergency medical attention on at least two occasions. Tony informed respondent about the emergency treatments, and reminded her to complete the modifications immediately so that DeFazio could execute them while he still had the capacity to do so. In the alternative, Tony asked respondent to refund the

advanced fees so the funds could be used to hire another attorney.

On October 11, 2006, on DeFazio's behalf, Tony sent respondent a letter asking her to perform the legal services she had agreed to perform or, in the alternative, to refund the advanced fees. Tony sent the letter, by certified mail with a return-receipt request, to the address that respondent had given to DeFazio: P.O. Box 1986, Upland, CA 91785. On October 24, 2006, the letter was returned as undeliverable; the order to forward respondent's mail to P.O. Box 1138, Upland, CA 91785-1138, had expired.

Respondent had not provided DeFazio or Tony with any address other than the one to which Tony directed the October 24, 2006, letter. DeFazio and Tony had never been to respondent's office and they never knew where her office was located.

By changing her mailing address, which was the only address she had provided to DeFazio and Tony to contact her, and by not informing them of any change of address, respondent effectively abandoned DeFazio, thus terminating her employment.

Respondent never performed any services on behalf of or for the benefit of DeFazio. She did not earn any of the advanced fees of \$695 that DeFazio paid her nor did she return any portion of the advanced fees.

In November 2006, DeFazio hired a new attorney.

On September 19, 2006, the State Bar opened an investigation pursuant to a complaint filed by DeFazio regarding allegations of misconduct by respondent in this matter.

On November 29, 2006, a State Bar investigator telephoned respondent to inform her that a disciplinary investigation had been initiated against her based on DeFazio's complaint. Respondent was informed about the allegations of the complaint and that the State Bar would send a letter to her asking for a her written response. She said that she would respond to the letter.

On November 29 and on December 18, 2006, a State Bar investigator sent respondent letters requesting that she answer in writing specific allegations of misconduct regarding the DeFazio complaint by December 15, 2006, and January 4, 2007, respectively. Respondent received the November 29 and December 18 letters. She did not answer either letter or otherwise

communicate with the investigator.

On January 19, 2007, a State Bar investigator telephoned respondent and asked whether she would respond to the November 29 and December 18 letters and to the substance of the allegations. Respondent gave verbal assurances that she would respond to the letters “immediately.” As of May 17, 2007, respondent had not responded to the investigator’s letter; had not provided a written response to the allegations in the DeFazio matter; and had not otherwise communicated with the State Bar Investigator about the substance of the allegations.

2. Conclusions of Law

a. Count One - Rule of Professional Conduct⁶ 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not completing the modification of DeFazio’s estate plan; not returning Tony’s telephone calls in May 2006; and by not being available to DeFazio or Tony although time was of the essence, respondent intentionally, recklessly or repeatedly failed to perform legal services competently in wilful violation of rule 3-110(A).

b. Count Two - Rule 3-700(A)(2) (Improper Withdrawal from Representation)

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until she has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

By not informing DeFazio or Tony of a change of address and by not ensuring that DeFazio received the work product that she claimed to have prepared on his behalf, respondent effectively withdrew from employment. She did not tell the client that she was withdrawing from employment. Respondent’s withdrawal prejudiced the client because he had to retain other counsel and suffered delay in modifying his estate plan. By not informing the client of her intent

⁶Future references to rule are to this source.

to withdraw from employment, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2).

c. Count Three - Rule of Professional Conduct 3-700(D)(2) (Unearned Fees)

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

Respondent did not provide any services of value to DeFazio before she terminated her employment and therefore did not earn any of the advanced fees which were paid to her. Respondent therefore wilfully violated rule 3-700(D)(2) by not returning DeFazio's advanced, unearned fee.

d. Count Four - Section 6068, subdivision (I) (Not Cooperating in Investigation)

Section 6068, subdivision (I) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the November 29 and December 18, 2006, letters, and by not otherwise providing a substantive response to the Investigator's information requests, respondent did not cooperate in the investigation of the allegations of misconduct regarding the DeFazio case in wilful violation of 6068, subdivision (I).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct⁷, std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) DeFazio

⁷Future references to standard or std. are to this source.

addressed with respondent the urgency of having the estate plan modified, and it was not done in a timely fashion. DeFazio had to retain other counsel.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (I) and to enter her default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors except for not having a disciplinary record in about 16 years of practice prior to the commencement of the misconduct in the DeFazio case.⁸

C. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.4(b), 2.6 and 2.10 apply in this matter. The most severe sanction is found at standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any, to the victim, with due regard to

⁸Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's State Bar membership records which reflect that respondent has no prior record of discipline since her admission to the State Bar of California on December 18, 1989.

the purposes of imposing discipline.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

In this disciplinary proceeding, respondent has been found culpable, in one client matter, of violating rules 3-110(A), 3-700(A)(2) and 3-700(D)(2), as well as section 6068, subdivision (I). The State Bar recommends, among other things, an actual suspension for 90 days and until respondent makes restitution to DeFazio.

In support of its disciplinary recommendation, the State Bar cites to *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690. *Aulakh* involved a single client matter in which the respondent failed to refund unearned fees, failed to perform legal services competently, failed to render an accounting to the client, and improperly withdrew from employment while the client was incarcerated. In mitigation, the respondent had practiced law for twenty years prior to any misconduct. In aggravation, the respondent was uncooperative in the disciplinary proceeding, and the misconduct significantly harmed the client. The Review Department of the State Bar Court recommended that the respondent be suspended for one year; the execution of said suspension stayed; and that respondent be placed on probation for three years and actually suspended for 45 days.

The violations and mitigating and aggravating circumstances in *Aulakh* are quite similar to those in the instant matter. The main difference is that the respondent in *Aulakh* participated (though not cooperatively) in the disciplinary proceeding, whereas respondent in this matter failed to participate in this proceeding, permitting her default to be entered even though she was aware that there was a pending disciplinary proceeding against her.

Respondent’s misconduct and lack of participation in this matter raises concerns about her ability or willingness to comply with her ethical responsibilities to the public and to the State

Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that discipline greater than that imposed in *Aulakh*, but less than the 90-day actual suspension recommended by the State Bar, is the appropriate disposition to recommend in this matter. The court also will recommend that respondent's actual suspension remain in effect until she makes restitution and complies with rule 205 of the Rules of Procedure. The court finds that this discipline, along with the other requirements set forth below, is adequate to protect the public and proportionate to the misconduct found in this matter.

V. DISCIPLINE RECOMMENDATION

ACCORDINGLY, IT IS HEREBY RECOMMENDED that respondent DEBRA LOUISE KASTELIC be suspended from the practice of law for one year; that execution of said suspension be stayed; and that she be actually suspended from the practice of law for 75 days and until she makes restitution to Anthony Jerry DeFazio in the amount of \$695 plus 10% interest per annum from May 2, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Anthony Jerry DeFazio, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). It is also recommended that respondent remain actually suspended until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205(a), (c).)

It is also recommended that she be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating her actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also,

rule 205(b).)

If the period of actual suspension reaches or exceeds 90 days, it is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 120 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 130 days of the effective date of the order showing her compliance with said order.⁹

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year from the effective date of the Supreme Court's order imposing discipline or during the period of her actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: December 19, 2007

DONALD F. MILES
Judge of the State Bar Court

⁹Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)